Before The
Federal Communications Commission
Washington, D.C. 20554

In Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	**Docket 96-98**
	)	
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	**Docket 95-185**

Further Notice of Proposed Rulemaking

REPLY COMMENTS of KMC Telecom Inc.

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Summary

In its FNPRM in the captioned proceeding the Commission asks whether unbundled network elements, including transport and switching elements, should be made available to requesting carriers even if those carriers do not provide local exchange service to their subscribers. KMC and other new entrants filed initial comments supporting such availability. LECs and LEC trade associations opposed adoption of the proposal. Section 251 of the 1996 Act simply and clearly requires that ILECs make available to new competitors unbundled network elements so that such competitors can enter the market for a variety of local services. The Commission's proposal, which is eminently practical, carries out the simple language of section 251 and will enhance competition coming from entities which, for various reasons, do not yet offer local exchange service.

Moreover, the expanded scope of the UNE rules is fully consistent with the Commission's ongoing regulatory activities concerning universal service and access charge reform. While UNEs are only a piece of a large and complex puzzle, there is no reason for the Commission to put off indefinitely wider accessibility to UNEs while it considers regulatory policy for universal service or access charges. The Commission has wide latitude to organize its dockets and fulfill its responsibilities in any reasonable and rational fashion, and the expansion now of UNE availability is clearly rational and reasonable.

No party opposed to adoption of the expanded rule has shown that it will undercut existing exchange access pricing under Part 69 of the rules. Even if it were to do so, that result is well within the ambit of Commission policy concerning access charges, which encompasses the gradual

elimination of universal service subsidies from access charges. Eventually UNEs, like other elements of the communications infrastructure, will be carrying an equitable share of support for universal service but that is no reason to delay use of UNEs by those carriers which do not currently provide local exchange service. No commenter opposed to expanding the UNE rules has demonstrated, or even made any serious effort to demonstrate, that it would suffer significant adverse effects from the proposed expansion.

Providing UNEs without regard to the requesting carrier's status as a local exchange carrier will not, as claimed by some commenters, lead to the erosion or disappearance of the Commission's jurisdiction over exchange access (or substitute) services. Both Iowa Utilities Board v. FCC, 120 F.3d 538 (8th Cir. 1997) and CompTel v. FCC, 117 F.3d 1068 (8th Cir. 1997) recognize that in certain circumstances there is a dual nature to federal and state jurisdictions. In the present instance, the FCC would retain its overall regulatory role with respect to exchange access services while the states would set the rates for local service. The Commission's prior observation in its Interconnection Order on Reconsideration, 11 FCC Rcd at 13048-49 (1996) regarding the necessity for a carrier providing local loop service to provide all services requiring local loop origination or termination in no way supports denying access to UNEs to carriers which do not provide local exchange service.

The Commission should adopt the proposal set forth in the FNPRM.

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Further Notice of Proposed Rulemaking

Reply Comments of KMC Telecom, Inc.

Pursuant to the provisions of sections 1.415 and 1.419 of the Rules, 47 CFR sections 1.415 and 1.419, KMC Telecom, Inc. ("KMC"), by the undersigned counsel, submits herewith its Reply Comments in the above-captioned matter. In its Third Order on Reconsideration, FCC 97-295, rel. Aug. 18, 1997, the Commission clarified that a requesting carrier may use shared and dedicated transport to provide exchange access services for the interexchange traffic of that carrier's local exchange subscribers. In a simultaneous Further Notice of Proposed Rulemaking ("FNPRM")

the Commission sought comments on the question whether to permit a requesting carrier to use unbundled dedicated or shared transport facilities in conjunction with unbundled switching ("UNEs") to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service. In its initial comments KMC urged the Commission to make such UNEs available to requesting carriers without regard to their provision of local exchange service. Other comments similarly supported that result.[1] Opposed to the adoption of the proposed rule were some LECs and industry associations representing LECs,[2] although several competitive LECs, including KMC, support the proposal. Commenters supporting the extension of the rule noted that section 251 of the Communications Act of 1934, 47 U.S.C. Section 251, which applies directly to the question, and the existing applicable rules, section 51.307 and 51.309, 47 CFR sections 51.307 and 51.309, encompass the proposed expanded use of UNEs. They contended that permitting requesting carriers to use transport and switching UNEs even where the requesting carrier does not provide local exchange service would lower barriers to entry and further the core purposes of the Telecommunications Act of 1996 (the "1996 Act") by encouraging additional competition. These parties noted also that nothing in the Commission's prior rulings in the local competition proceeding, Docket No. 96-98, or any other Commission ruling was inconsistent with the proposed extension of UNEs to carriers without local exchange customers. Similarly, they found nothing in two

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[1]Among those supporting the proposed extension of the UNE rules are WorldCom, AT&T, LBC Telecom, and CompTel.

[2]Bell Atlantic, Southern Bell, Southwestern Bell, Ameritech, U.S. West and GTE were opposed, as well as Sprint, ALTS, USTA, GTE, NECA and Time-Warner Communications.

decisions of the Eighth Circuit Court of Appeals, Iowa Utilities Board v. FCC, 120 F.3d 753 (1997), and CompTel v. FCC, 117 F.3d 1068 (1997), inconsistent with the proposal.

Those opposed to the proposal contend that allowing requesting carriers to use UNEs for subscribers to whom they do not provide local exchange service would contravene the broad purposes of the 1996 Act, "eviscerate" the existing rules and policies concerning exchange access rates and universal service, shift regulatory jurisdiction over interstate access to the states, cost the LEC's enormous amounts of money and would actually impede the growth of competition in the marketplace.

After reviewing the filed comments KMC continues to urge the Commission to adopt the proposed rule, referred to hereafter as the "enhanced" or "expanded" UNE rule. The comments of those opposing the rule, including some claims that are fanciful in theory, self-protective and utterly lacking in supporting data, serve only to emphasize that expansion of the availability of UNEs is consistent with the language and purposes of the 1996 Act and with the encouragement of competition for local telecommunications services.

I. EXPANDED AVAILABILITY OF UNEs ADVANCES THE PURPOSES OF THE 1996 ACT AND IS FULLY CONSISTENT WITH ALL OF ITS PROVISIONS

The principal Congressional purpose in the 1996 Act was to advance competition in the telecommunications industry. Section 251 of the Act thus calls upon incumbent local exchange carriers to make unbundled network elements available to requesting carriers "for the provision of telecommunications service." See 47 USC Section 251 (c) (3). The proposed rule would simply

effectuate this straightforward Congressional command. Except for a few especially far-fetched contentions of those opposing adoption of an expanded UNE rule,[3] there appears to be no dispute about the application of section 251(c)(3) to the circumstances under review. Ordinarily, that would be the end of the matter since, once Congress has made its meaning clear, there is no occasion to evade the implementation of that meaning. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 at 842-43(1984) ("if the intent of Congress is clear, that is the end of the matter . . . "). Those who oppose expanding the availability of UNEs argue, however, that doing so would be inconsistent with other sections of the 1996 Act and other Congressional purposes, specifically the preservation of universal service. They offer convoluted paths around Chevron, point to snippets of legislative history and quote language from other provisions of the 1996 Act, particularly section 254, 47 U.S.C. section 254, requiring that the federal universal service support mechanism be "sufficient" and section 251(g), 47 U.S.C. section 251(g), purportedly requiring that ILECs be compensated for access under pre-Act regulations.[4] One commenter argues that requiring carriers using UNEs to provide local service advances the purposes of section 251 by that very requirement.[5]

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[3]Bell South contends that a UNE applied to IXC use is not telecom service under section 251(c)(3). Comments, p.9. Sprint assumes that the FNPRM is directed only to tandem switching, not local exchange switching. Comments, p.1 n 2. In its Comments, GTE contends that shared transport is not a UNE. Comments, p.2.

[4] See, e.g. Ameritech Comments, pp. 2-7; GTE Comments, p.2.

[5] Time Warner comments, p. 14.

There is no dispute that access charges, interconnection and universal service are all critical elements in the statutory scheme. But the Commission may proceed as it thinks best. The structure of the 1996 Act makes clear that, except for certain deadlines not here relevant, when and how to integrate the various elements of the Act is for the Commission to determine. It is well settled that an agency has wide latitude in interpreting its own enabling statute and its interpretation of its own organic statute is to be given great deference. Florida Cellular Mobil Comm. v. FCC, 28 F.3d 191, 196 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 135 (1995). The Commission may therefore choose to advance the purposes of section 251 in a wide variety of ways and the fact that there may have been other ways to do so is irrelevant if the method chosen is reasonable and rational. APSCO v. FCC, 76 F.3d 395, 398 (D.C. Cir. 1996); Loyola University v. FCC, 670 F.2d 1222, 1227 (D.C. Cir. 1982). Expanding the UNE rule will significantly ease the market entry burden for carriers like KMC and therefore contributes directly to the fulfillment of the Congressional purpose set forth in section 251. In addition, no showing has been made that in fact expansion of the UNE rule would undermine other Congressional purposes. The Commission has initiated a universal service docket and that is the primary vehicle for exploring the issues presented by that important element of Congressional policy.[6] Expanding availability of UNEs is only one of many elements and the decision to do so as suggested in the FNPRM is well within the Commission's discretion. Indeed, given the massive tasks assigned by the 1996 Act to the Commission and the highly dynamic nature

[6] Universal Service Report and Order, Docket 96-45, FCC 97-157, rel. May 8, 1997.

of the telecommunications industry its choice of how to proceed must be respected. Rainbow Broadcasting Co. v. FCC, 949 F.2d 405, 408-9 (D.C. Cir. 1991).

II. NONE OF THE ARGUMENTS PROFERRED BY THOSE OPPOSED TO EXPANDING THE UNE RULES IS SOUND. THEY ARE BASED ON CONJECTURE, UNPROVEN CLAIMS OF INJURY AND A MISUNDERSTANDING OF THE BOUNDARY BETWEEN FEDERAL AND STATE JURISDICTION.

None of the commenters opposed to the extension of the UNE rules disputes that the proposal would make it easier for new entrants to establish competitive services on a market-by-market basis. Instead, they confine themselves to legal and factual objections to the implementation of the expanded rules, including some contentions that the effect of the proposal would actually inhibit competition in certain specific segments of the market. Upon close inspection it is clear that none of the objections is well taken. The rule modification suggested in the FNPRM is amply justified by the record and by the application of the Commission's expert judgment to the circumstances.

The arguments of those opposed to the rule extension fall into six basic categories. It is contended that the expanded UNE rule would: (1) impede overall Congressional purpose by impairing universal service;[7] (2) eviscerate the existing access charge system, a result which would lead to loss of existing universal subsidies embedded in current Part 69 regulations;[8] (3) effectively transfer jurisdiction, including pricing for interstate access, to the PUCs, thus depriving the

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[7]GTE Comments, pp. 2-6; Ameritech Comments, pp. 2-7; NECA Comments, p.5.

[8]ALTS Comments, p.3; GTE Comments, p.3; Sprint Comments, pp. 2-6; USTA Comments pp. 3-12.

Commission of an element of its jurisdiction important for effectuating the 1996 Act;[9] (4) place an enormous financial burden on the ILECs costing one as much as $300 million;[10] (5) impede competition by adversely affecting one or another class of competitor;[11] and (6) unconstitutionally deprive ILECs of property.[12] None of these contentions is sound. Neither individually nor in the aggregate do they justify rejection of the expanded UNE rule.

A. The Claim That The Expanded UNE Rule Would Lead To The Disappearance Of Local Exchange Access Service Priced Under Part 69 Is Pure Conjecture. Even If It Were To Occur There Would Be No Significant Damage To The Process of Preserving Universal Service.

Numerous commenters opposing expansion of the UNE rule contend that doing so would essentially eliminate exchange access service under Part 69 because UNEs could be used as a substitute for exchange access and would be less expensive. If this were to happen, they contend, the universal service subsidies currently embedded in exchange access rates would disappear and ILECs would be left with significantly larger financial burdens. None of those arguing this point has demonstrated that the result they foresee will in fact occur. While there may be cases in which requesting carriers will prefer to rely on UNEs to provision exchange access, there will undoubtedly be others in which UNEs cannot be so used. Even if IXCs do use shared transport UNEs as a

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[9]GTE Comments, p. 12; Time Warner Comments, p.2; Ameritech Comments, p. 11; Bell South Comments, p.10.

[10]Bell South Comments, p.4.

[11]Time Warner Comments, p. 12; Bell South Comments, pp. 11-12.

[12]Ameritech Comments, p.19

substitute for Part 69 access, this would only affect the transport component of Part 69 access revenues, and would not impair the vastly greater revenues flowing from end user charges, PICCs, and other elements under the Commission's recent restructuring of access rates.[13] No showing has been made either that the burden on ILECs from the resulting reduction of transport revenues would be substantial or that the loss of subsidy for universal service would, in the short run, create serious funding problems. This failure of proof is all the more significant in light of the fact that the Commission is in the midst of its broad-based review of universal service.[14] If it were to find that the popularity of UNEs was having an adverse effect on universal service funds it could make compensating adjustments to assure that universal service is not underfunded. Indeed, even in the Access Charge Reform proceeding[15] the Commission noted that it would address pricing flexibility as competition develops[16] and established a process for elimination of implicit subsidies over time.[17]

In this context, expanding UNEs, itself a pragmatic pro-competitive step, will be only one of many elements of a very broad picture to be taken into account in further analysis of access charges and universal service. Far from being a problem, the competitive impact of competition on

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[13]Access Charge Reform, First Report and Order, Docket 96-262, FCC 97-158 rel. May 16, 1997.

[14]Universal Service Report and Order, Docket 96-45, FCC 97-157, rel. May 8, 1997.

[15]Access Charge Reform, First Report and Order, Docket 96-262, FCC 97-158 rel. May 16, 1997.

[16] Id., par. 14.

[17] Id., par. 46.

access charges is a goal already endorsed by the Commission.[18] If the Commission could not make sensible adjustments to one or another of its rules until it had adopted some grand scheme, little progress toward implementation of section 251 could be anticipated for a long time.

B. Adoption Of An Expanded UNE Rule Would Not Result In The Loss Of Federal Jurisdiction Over Access Services.

Numerous parties contend erroneously that expanding the availability of UNEs would lead to loss of federal jurisdiction over the provision of exchange access services. The contention is that UNEs are typically tariffed and regulated at the state level and if UNEs were to be available to requesting carriers who do not offer local exchange service the expanded UNEs will simply be substituted for existing exchange access service -- a service element which, because it is used to connect interstate traffic to local exchange facilities, is currently subject to federal jurisdiction. Parties advancing these arguments quote from Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) and CompTel v. FCC, 117 F.3d 1068 (8th Cir. 1997). In fact, the decisions in those two cases make the opposite point; i.e., that jurisdiction is a matter of functionality and purpose and is dual in certain respects. Even if these appellate decisions did not recognize the dual nature of the telecommunications regulatory system that dual nature would be indisputable, arising as it does from Sections 1 and 2(b) of the Communications Act, 47 U.S.C. Sections 151 and 152(b). See Louisiana Public Service Commision v. FCC, 476 U.S. 355, 370 (1986).

That the Commission will continue to be involved in the terms and conditions under which UNEs are made available if they are substituted for exchange access service is clear from the 1996 Act. Section 251(d)(2), 47 U.S.C. section 251(d)(2), provides that the Commission shall determine

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[18]Id., par. 269.

what network elements should be made available, taking into account, inter alia, whether the failure to provide such elements would impair the ability of a carrier to provide services it seeks to provide. See 47 U.S.C. section 251(d)(2)(B). Moreover, section 251(d)(3) of the 1996 Act, 47 U.S.C. section 251(d)(3), provides that the FCC shall not preclude the enforcement of any state regulation (in this area) if such regulation is consistent with the requirements of section 251 and does not "substantially prevent implementation of the requirements of this section and the purposes of this part." See 47 U.S.C. sections 251(d)(3)(B) and (C). By necessary implication, therefore, this Commission may become involved if state regulation is not consistent with section 251 or substantially prevents implementation of the requirements of section 251 or the relevant part of the 1996 Act. Significantly, in rejecting the Commission's effort to establish pricing guidelines for states to follow in regulating local service, the Iowa Utilities Board decision nevertheless recognized that the foregoing sections of the 1996 Act establish a "division of labor" in certain limited areas. See id., 120 F.3d 753 at 794-795 and nn. 10 and 12. See also CompTel, 117 F.3d 1068 at 1073. Simply stated, if UNEs are put in service as substitutes for exchange access service, federal jurisdiction would remain unimpaired over the provision of the latter service. To be sure, states would retain ratemaking jurisdiction over UNEs, but the provision of service as a whole would remain subject to federal control pursuant to 47 U.S.C. sections 201(a) and (b) to the extent a UNE is being used to connect IXC's or other interstate service providers, or their customers, with local exchange services.[19] This result is compelled, alternatively, by section 253 of the 1996 Act, 47 U.S.C. section

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[19]One of the areas the Iowa Utilities Board decision acknowledges as a continuing responsibility of the FCC arises from 47 U.S.C. section 251(g) ("enforcement of exchange access"). Moreover, the Court's decision explains the difference between interconnection and unbundled access on the one hand and exchange access, on the other, by noting that the former permit the requesting carrier to provide local exchange services while exchange access does not

(continued...)

253 which obligates the FCC to preempt any state statute, regulation, or legal requirement which prohibits or has the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunication service unless such action meets certain criteria. 47 U.S.C. section 253(a), (b) and 253(d). Rates imposed by or under state law, therefore, which inhibit the achievement of the broad scheme of the 1996 Act would have to be preempted, and this is so even in the face of section 2(b) of the Act, 47 U.S.C. section 152(b), excluding FCC jurisdiction over intrastate matters.[20] See The Public Utility Commission of Texas, CCB Pol 96-13, et al., Memorandum Opinion and Order, FCC 97-346, rel. Oct. 1, 1997, slip op. at 18-29. Of course, as the Commission itself has noted, the federal exchange access rules would remain in place and subject to exclusive FCC jurisdiction.[21]

C. Implementation Of An Enlarged UNE Rule Will Not Impede Competition But Instead Will Enhance It.

It is variously contended that making UNEs available to requesting carriers who do not use them in conjunction with local exchange service will impede, rather than enhance competition. Many of these arguments are manifestly strained and in fact difficult even to

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[19](...continued)
permit the provision of such service. Id. at 799 n.20. To the extent, therefore, that UNEs are made available to requesting carriers that do not provide local exchange service, but use the UNEs only as a substitute for exchange access, logic suggests that the FCC's exchange access jurisdiction should not be impaired or diminished as compared with existing exchange access services.

[20] See also 47 U.S.C. sections 261 and 601(c)(1) which are relevant to the Commission's preemption power.

[21] See Interconnection First Report and Order on Reconsideration at par. 11 quoting Implementation of the Local Exchange Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, rel. August 8, 1996.

understand. The simple fact is that expanding the availability of UNEs allows carriers of various configurations and offering various combinations of service to align their facilities flexibly. Those risking capital and other resources to enter the market or expand their role in the market should have the widest possible latitude to pick and choose those facilities, services, rates and other components of service without having to overcome artificial restrictions on their access to unbundled facilities. This potential for market-based competitive opportunities, especially opportunities which should help to drive subsidies out of the present system, is exactly what the FCC contemplated in the Access Reform Order.[22] If as certain ILEC's claim,[23] the expanded UNE Rule poses keener competitive challenges to certain competitors then they would otherwise face, that is not occasion to reject the rule. Indeed, it is all the more reason to adopt it. In the unlikely event that expanding the rule were to impede the development of competition the Commission could always readdress the issue on the basis of such experience.

D. Adoption Of An Expanded Rule For UNEs Should Improve ILEC Revenues In The Long Run By Enlarging Industry Revenue As A Whole. Not One Shred Of Evidence Has Been Proferred In This Proceeding To Demonstrate That the Revenue Impact on the ILECs Will Be Negative, Let Alone Significantly Adverse.

Numerous assertions are made by those opposing the expanded UNE rule that the revenue impact on the ILEC's will be adverse and negative. One commenter claims that it will lose $300 million in revenues if the availability of UNEs is expanded and all transport services are converted

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[22] See note 17, supra.

[23] See, e.g., Comments of Time Warner, p.12, Bell South Comments, p.4.

to UNEs.[24] Another simply asserts that the revenue effect on it "could" be confiscatory.[25] These claims are completely unsubstantiated and are entitled to no weight. Presumably, if those making such claims had data to demonstrate that their claims were entitled to serious consideration, they would have provided such support. On the other hand, it is likely to be the case that proving such claims is almost impossible because the extent to which UNEs will be used by carriers not providing local exchange service is still uncertain, and adoption of the proposed expansion would only lead to further uncertainty about the revenue effects. While the ILEC commenters and those advancing similar arguments stridently assert that exchange access will virtually disappear, the fact is that facility provisioning and pricing is undergoing gradual changes in many directions in response both to the 1996 Act and to the Commission's careful point-by-point, step-by-step implementation of new rules and policies. No one can be expected at this point to know with any certainty what the revenue effect of any particular change will be.[26] Rather the Commission and the industry should closely monitor the use to which expanded UNEs are put over time. If it appears that the revenue effects are as dire as predicted there will be time enough in the context of the industry's gradual evolution to a more competitive model to make adjustments to the extent doing so is appropriate.

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[24] See Bell South comments, p. 4.

[25] See Ameritech comments, p. 19.

[26] At p. 10 of its comments, Bell South contends that the several states "may" set UNE prices at levels which do not make the same contribution to joint and common costs as exchange access currently does. Apart from the question whether the states will have plenary price-setting jurisdiction over UNEs used as substitutes for exchange access service, it is obvious that what "may" happen also may not happen.

III. NEITHER JUDICIAL NOR ANY PRIOR COMMISSION DECISIONS PRECLUDE ADOPTION OF THE EXPANDED RULE FOR UNEs.

There is nothing in either Eighth Circuit opinion to which the FNPRM refers which precludes adoption of an expanded UNE rule. Indeed, CompTel stands for the proposition that the Commission can proceed by interim rules, pending the development of broader industry changes or regulatory regimes. See CompTel v. FCC, 117 F3d 1068 at 1073-1075. That is all the Commission would be doing here, even if it were not to specifically designate the enhanced availability of UNEs as interim in nature, because the ongoing review of interconnection, universal service and access charge reform create the context in which enhanced use of UNEs will occur.

Similarly, Iowa Utilities Board, which is directed primarily to an issue irrelevant to the instant matter, i.e., the Commission's effort to impose pricing rules on state commissions, does not preclude the adoption of an enhanced UNE rule. Time Warner argues that Iowa Utilities Board "could be read" for the proposition that only states could set UNE rates, even if the facilities were used for interstate access. [27] But there is no such holding, or even dicta, in Iowa Utilities Board. The opinion is careful to draw jurisdictional boundaries for ratemaking based on the use to which a particular element of service is put; the use of UNEs for interstate access would leave the FCC with at least coordinate jurisdiction over such facilities to the extent they are in fact used in the provision of interstate services and in lieu of federally regulated access charges, in order to preserve the integrity of the federal regulatory scheme. See Iowa Utilities Board, 120 F.3d 753 at 794 where the

[27] Comments, p. 6.

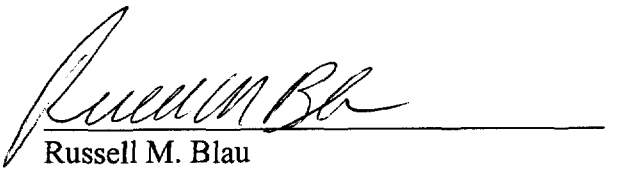
court concedes that section 251 reflects the need for FCC involvement in, inter alia, UNEs. See also CompTel, 117 F.3d at 1073.

IV. CONCLUSION

The plain meaning of section 251 of the statute is that the provision of UNEs to competitive carriers should be compulsory whether or not such carriers provide local exchange service. By adopting such a rule the Commission would enhance competitive opportunities to enter local telephone markets by removing an artificial restriction on requesting carriers' access to the full panoply of existing facilities and services. Doing so in the context of numerous ongoing proceedings in which the protection of universal service is a key element is fully consistent with the statute as a whole, and the FCC would retain its jurisdiction over facilities and services integrally involved in the origination and termination of interstate services. Existing judicial and FCC precedent fully supports the enhanced UNE Rule. Convoluted arguments that enhancing flexibility for newly emerging competitive carriers would actually impair competition should be disregarded. There is

no evidence in the record demonstrating that the impact on ILECS would be adverse or, if it is, consequential.

Respectfully submitted,



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